No. 83-556

In the Supreme Court of the United States

OCTOBER TERM, 1983

PRESTO CASTING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the Board properly found that petitioner violated Section 8(a)(5) and (1) of the National Labor Relations Act (29 U.S.C. 158(a)(5) and (1)) by refusing to acknowledge and sign a collective bargaining agreement reached with the union and by refusing to implement provisions of that contract relating to dues checkoffs and employee grievances.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A8) is reported at 708 F.2d 495. The Decision and Order of the National Labor Relations Board (Pet. S. App. A10-A71)[1] is reported at 262 N.L.R.B. 346.

JURISDICTION

The decision of the court of appeals (Pet. App. A1-A8) was issued on June 16, 1983, and judgment was entered on September 7, 1983. A petition for rehearing was denied on August 2, 1983. The petition for a writ of certiorari was filed on September 30, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1]"Pet. S. App." citations are to the supplemental appendix filed subsequent to filing of the petition. "Pet. App." citations are to the appendix accompanying the petition.

STATUTE INVOLVED

Relevant provisions of the National Labor Relations Act, 29 U.S.C. (& Supp. V) 151 *et seq.*, are set forth at Pet. App. A8.

STATEMENT

1. Petitioner operates a metal casting plant in Phoenix, Arizona, that produces parts for the aerospace industry. The union[2] was certified as collective bargaining representative of petitioner's production and maintenance employees in November 1980, and the parties began contract negotiations in December 1980. The parties agreed at the outset of negotiations to treat noneconomic and economic issues separately. Pet. S. App. A18.

The union called a strike on February 9, 1981, after negotiations broke down between Garza, the company negotiator, and Smith, the union representative. Garza was replaced by a new negotiator, Long, and by February 10 the parties had reached agreement on all noneconomic issues. Pet. S. App. A19-A20. On that date the union requested and petitioner agreed that if the economic issues were resolved before February 18, petitioner would make wage rates retroactive to the date of the union's certification. The parties agreed to meet on February 17 to attempt to resolve the economic issues. Based on these agreements, the union called off the strike and the employees returned to work on February 11. Pet. S. App. A20-A21.

The parties exchanged proposals and counterproposals on economic issues during a lengthy bargaining session on February 17. Late in the meeting, Long submitted petitioner's final offer. Pet. S. App. A22-A23. The union submitted a counterproposal which Long rejected. The union then made another proposal, but Long reiterated the finality of the last offer and declared negotiations at an impasse. Pet.

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[2]United Steelworkers of America, AFL-CIO.

S. App. A24-A25. The parties nonetheless agreed to meet again on February 26. Negotiations at the February 26 meeting were unsuccessful and the union went on strike the next day.

On March 6, after a majority of striking employees had returned to work, the union decided to terminate the strike and accept petitioner's final offer. The union sent a mailgram accepting the offer on March 6. Pet. S. App. A27-A28. On that same day, a union representative, Campbell, told Garza that the union was accepting petitioner's final offer, stating that "[n]ow we've accepted this final proposal * * * [y]ou're not going to piss backwards on us, are you?" (Pet. S. App. A57). Garza replied, "No" (*ibid.*). Garza then informed Long that the union was accepting petitioner's final offer. Long, however, notified a federal mediator who had been participating in the negotiations that petitioner wanted to withdraw its final offer, and the mediator so informed the union. Petitioner received the union's acceptance mailgram on March 7. Pet. S. App. A59.

Acting on the union's March 6 acceptance of petitioner's offer, the remaining strikers reported for work on March 9, unconditionally seeking reinstatement. That same day petitioner wrote to the union informing it that there could be no contract based on petitioner's final offer because the union had previously rejected that offer. By letters of March 12 and 16, the union stated its position that the parties had a contract and requested dues deductions for employees "as per contract" (Pet. S. App. A28). The union also presented grievances pursuant to the contract in March and again in May. Petitioner refused to acknowledge the existence of an agreement or to conform to its provisions (Pet. S. App. A61).

2. The Board, adopting the findings and conclusions of the administrative law judge, found that petitioner violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and

(1), by refusing to recognize and sign the contract and by refusing to abide by its grievance and dues checkoff provisions, notwithstanding the union's earlier rejection and counterproposals.[3] The Board applied its rule enunicated in *Pepsi-Cola Bottling Co.*, 251 N.L.R.B. 187, 189 (1980), enforced, 659 F.2d 87 (8th Cir. 1981), holding that (Pet. S. App. A58-A59):

> a complete package proposal made on behalf of either party through negotiations remains viable, and upon acceptance *in toto* must be executed as part of the statutory duty to bargain in good faith, unless expressly withdrawn prior to such acceptance, or defeased by an event upon which the offer was expressly made contingent at a time prior to acceptance.

The Board found that the parties' February 10 agreement on noneconomic issues and petitioner's February 17 offer on economic issues represented a complete, unconditional contract package, and that the union's acceptance conveyed to petitioner's representative, Garza, was effective prior to Long's purported attempt to withdraw the offer through the federal mediator (Pet. S. App. A57-A60).

The Board's order required petitioner to acknowledge and sign the contract and give it effect retroactive to March 6, 1981 (Pet. S. App. A68).

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[3]The Board also found that petitioner violated Section 8(a)(5) and (1), 29 U.S.C. 158(a)(5) and (1), by discontinuing its past practice of giving employees annual Christmas gifts of turkeys without notifying and bargaining with the union. In addition, the Board found that petitioner violated Section 8(a)(3) and (1), 29 U.S.C. 158(a)(3) and (1), by failing to reinstate in a timely manner economic strikers upon their unconditional offer to return to work and by requiring strikers to sign a company-prepared request for reinstatement as a condition of reinstatement (Pet. S. App. A66). The court of appeals affirmed the Board with respect to the Christmas gifts and reinstatement request forms, but denied enforcement of that portion of the Board's order concerning failure to make timely reinstatement (Pet. App. A6-A7). None of these issues is before this Court.

3. The court of appeals enforced the Board's order concerning enforcement of the contract. The court noted that technical rules of contract formation do not restrict the collective bargaining process "because the parties are obliged by their relationship to deal exclusively with each other and because policies of the Act dictate that this process not be encumbered by undue formalities" (Pet. App. A4-A5). The Court expressly adopted the Eighth Circuit's holding in *Pepsi-Cola Bottling Co.* v. *NLRB, supra,* that a collective bargaining offer is not automatically terminated by rejection or counterproposal. Rather, it may be accepted within a reasonable time unless: (1) expressly withdrawn before acceptance; (2) expressly conditioned on a subsequent event; or (3) intervening circumstances would make the acceptance unfair (Pet. App. A5). The court found that substantial evidence supported the Board's conclusion that petitioner's final offer was not withdrawn or otherwise terminated (Pet. App. A5-A6).

ARGUMENT

Petitioner contends that the Board's failure to apply technical contract principles of offer and acceptance to the collective bargaining process conflicts with the policies underlying the Act and the decisions of other courts. There is no merit to this contention.

1. It is well-established that technical contract rules do not control whether an employer and union have in fact reached an agreement through collective bargaining. *Pepsi-Cola Bottling Co.* v. *NLRB,* 659 F.2d at 89; *NLRB* v. *Donkin's Inn, Inc.,* 532 F.2d 138, 141-142 (9th Cir.), cert. denied, 429 U.S. 895 (1976); *NLRB* v. *Truckdrivers,* 532 F.2d 569, 571 (6th Cir.), cert. denied, 429 U.S. 859 (1976); *Lozano Enterprises* v. *NLRB,* 327 F.2d 814, 818 (9th Cir. 1964). As this Court has observed, "[a] collective bargaining

agreement is not an ordinary contract for the purchase of goods and services, nor is it governed by the same old common-law concepts which control such private contracts." *Transportation-Communication Employees Union* v. *Union Pacific R.R.*, 385 U.S. 157, 160-161 (1966).

In a commercial setting, the traditional rule that "rejection terminates an offer" allows the offering party to strike a bargain elsewhere with no danger of being bound to more than one contract. But in collective bargaining, unlike the private commercial context, parties are bound to deal exclusively with each other and to bargain in a good faith effort to reach agreement. Upon rejection of an offer, the offeror may not simply seek out another contracting party. "The choice is generally not between entering or refusing to enter into a relationship, for that in all probability preexists the negotiations." *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 580 (1960). Thus, the common law rule that a rejection or counteroffer necessarily terminates the offer has little relevance to collective bargaining, and runs counter to the federal labor policy encouraging collective bargaining agreements. In accord with these principles, the Board has ruled that an offer remains open for a reasonable time unless expressly withdrawn or made contingent on a condition subsequent, or unless intervening circumstances would make an acceptance unfair. *Pepsi-Cola Bottling Co.* 251 N.L.R.B. at 189; *Penasquitos Gardens, Inc.*, 236 N.L.R.B. 994, 995 (1978), enforced mem., 603 F.2d 225 (9th Cir. 1979).

There is no merit to petitioner's contention (Pet. 5-11) that the Board's approach conflicts with federal labor policy because it results in the imposition of substantive terms against the will of the parties. To the contrary, the essence of the Board's inquiry is whether the parties have actually reached an agreement, as opposed to whether the technical

requirements of contract law have been observed.[4] *Penasquitos Gardens, Inc.*, 236 N.L.R.B. at 995; *NLRB* v. *Donkin's Inn, Inc.*, 532 F.2d at 141. Nothing in the Board's rule requires or allows the imposition of a contract to which a party has not assented. An employer is free to withdraw its offer at any time before acceptance, or expressly to condition its offer.[5] Moreover, an employer cannot be held to an

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[4]Petitioner's apparent contention that common law rules of offer and acceptance are *required* in collective bargaining is tautological. Petitioner offers nothing more than bare assertion to support its submission that the traditional rules must be adhered to in order to foster agreement between parties. There is nothing inherent in the traditional rules, as opposed to the Board's approach based on its experience with collective bargaining under the Act, that will insure successful bargaining. And, as we have demonstrated, the Board's rule is tailored to the particular legal relationships and requirements of the parties in the collective bargaining process.

[5]Petitioner argued before the Board and court of appeals that its final offer of February 17 was expressly contingent on a condition subsequent — *i.e.*, that the parties reach agreement before February 18 (Pet. S. App. A60; Pet. App. A5). Petitioner appears to revive that argument before this Court (Pet. 10).

The Board found that the February 18 deadline was a condition only of the parties' separate agreement to make wage rates retroactive to the date of the union's certification (Pet. S. App. A20-A21), not of the collective bargaining agreement as a whole. The Board stated that, "[i]n view of [the company's] bargaining stance, and its insistence upon the finality of its proposal, it is unrealistic to contend that the proposal contained any doubt, or contingencies, or conditions" (Pet. S. App. A60). As the court below concluded, this finding was supported by substantial evidence (Pet. App. A5-A6); it does not warrant review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

In any event, there is ample support for the Board's finding. Petitioner's sole support for its contention is an offhand remark by negotiator Long, in testimony before the administrative law judge, that, with respect to the February 17 negotiating session, "[e]ither we were going to get an agreement or all bets were off" (Transcript of Proceedings Before the Board at 679). Read in context, Long's testimony referred only to the separate agreement on retroactivity, not to the entire agreement

unexpired offer for more than a reasonable time or in circumstances where it would be unfair to do so.[6] See, *e.g.*, *Lane Construction Corp.*, 222 N.L.R.B. 1224 (1976). The Board's rule is thus designed to foster, not to hinder, the process of mutual agreement through collective bargaining.

2. The Board's approach has been approved by all courts of appeals that have considered it. *Pepsi-Cola Bottling Co.* v. *NLRB*, 659 F.2d at 89; *Penasquitos Gardens, Inc.* v. *NLRB*, 603 F.2d at 225; see *Capitol-Husting Co.* v. *NLRB*, 671 F.2d 237, 244 (7th Cir. 1982). The cases relied on by petitioner (Pet. 8) are not to the contrary.

In *F.W. Means & Co.* v. *NLRB*, 377 F.2d 683, 686 (7th Cir. 1967), the court acknowledged that " 'technical rules of contracts' do not necessarily control all decisions in labor-management cases," and stated only that the normal rules of offer and acceptance *generally* obtain. Moreover, that case did not involve withdrawal of an accepted offer. Rather, the court there held that, in the circumstances of the case, the employer had not agreed to rescind an offer accepted by the Union merely because the employer had agreed to modify two of its terms, and therefore the union

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(Transcript at 677-679). Moreover, the parties continued to negotiate after February 18; no mention was made at the February 26 session that petitioner's final offer was no longer effective. Further, there is evidence that petitioner thought that the offer remained open. When Long heard on March 6 that the union had sent a mailgram of acceptance, he tried expressly to withdraw the offer (Pet. S. App. A59; Pet. App. A5). Petitioner's final offer of February 17 thus remained open and was not terminated by the failure of the parties' separate agreement on retroactivity.

[6]The fact that a union may have lost a strike between rejection and acceptance, thereby enhancing the employer's bargaining strength, does not create such unfairness as to negate the acceptance where, as here, the acceptance came within a reasonable time and the employer had an opportunity to withdraw its pre-strike offer. Pet. App. A6; *Pepsi-Cola Bottling Co.* v. *NLRB*, 659 F.2d at 90.

was not free to seek a more favorable contract than the one to which it had agreed. In *Lozano Enterprises* v. *NLRB*, 327 F.2d 814, 818-819 (9th Cir. 1964), the court expressly refused to apply technical contract rules in determining whether the parties had arrived at a binding agreement. The court noted that "in general" the normal rules of offer and acceptance apply, but stated (327 F.2d at 818-819):

> We do not think that, in deciding whether, under a particular set of circumstances, an employer and a union have in fact arrived at an agreement that the employer is then obliged to embody in a written contract upon the union's request, the Board is strictly bound by the technical rules of contract law.

Similarly, the court in *Teamsters Local 524* v. *Billington*, 402 F.2d 510, 513 (9th Cir. 1968), held, in a suit for specific performance of an arbitration clause in a collective agreement, that an employer's refusal to sign an agreement does not prevent its enforcement. And *United Steelworkers* v. *Bell Foundry Co.*, 626 F.2d 139, 140 (9th Cir. 1980), held only that, in the particular circumstances involved, a union's request for clarification of an employer's proposal did not serve to modify the proposal so as to relieve the employer of its obligations under the proposal. *Bell Foundry Co.*, moreover, was a suit in federal court to compel arbitration, and while the court decided the case by reference to general contract principles, nothing in its opinion suggests that the Board is bound by such principles in determining whether the parties have reached agreement on a contract.[7]

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[7]Petitioner cites prior decisions of the Board (Pet. 7) which it contends are in conflict with the Board's current position as expressed in *Pepsi-Cola Bottling Co.*, 251 N.L.R.B. at 189. Each of the cases is distinguishable on its facts. Thus, in *Worrell Newspapers, Inc.*, 232 N.L.R.B. 402, 407 (1977), the Board expressly rejected the contention

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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that general contract principles applied in circumstances similar to those here and distinguished all of the cases relied on by petitioner on their facts. *Id.* at 407 nn.15 & 18.

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